ATTORNEYS FOR APPELLANT:

STANLEY C. FICKLE
T. JOSEPH WENDT
Barnes & Thornburg LLP
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

DANIEL CUELLER
Schreckengast, Helm & Cueller
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY d/b/a WISHARD MEMORIAL HOSPITAL,	)	
Appellant-Defendant,	)	
vs.	)	No. 49A04-0803-CV-133
PHYLLIS LONG,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
Cause No. 49D11-0509-CT-38383

November 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial in this personal injury action, Appellant-Defendant The Health and Hospital Corporation of Marion County, Indiana, d/b/a Wishard Health Services ("Hospital") appeals a $245,000 verdict and judgment in favor of Appellee-Plaintiff Phyllis Long. Upon appeal, the Hospital challenges the sufficiency of the evidence to support the verdict by claiming that there was no evidence at trial that the Hospital knew or reasonably should have known of the premises defect causing Long's injuries. We affirm.

FACTS AND PROCEDURAL HISTORY

At the time of her injury, Long was a correctional officer for the Marion County Sheriff's Department where she was assigned to the Hospital. The Sheriff's Department occupies two separate wards at the Hospital, a detention ward for inmates needing overnight or multi-day care, and a holding ward where inmates are treated on an emergency basis. The holding ward is divided into a larger room for observation and three smaller rooms, Rooms A, C, and D, which have doors. The doors to these smaller rooms, which swing in both directions, are made of metal and weigh approximately 100 pounds.

On July 15, 2004, Long was assigned to the holding ward when she encountered an unruly inmate in Room C. Long persuaded the inmate to sit on the gurney located in Room C, and she chained the inmate's ankle to the gurney. As Long attempted to leave Room C, she felt the door hit her in the back, which appeared to be due to the inmate's kicking the door. According to Long, it was not unusual for inmates to kick the doors. Long and Deputy Jimmy Merrell re-entered Room C, handcuffed the inmate's hand to the gurney, and attempted to wheel her out of Room C into the larger observation room. While wheeling the

inmate's gurney through the Room C door and into the observation room, the door fell onto Long, hitting her on the neck, head, and upper part of her back, and knocking her to the ground. There was conflicting testimony as to whether the unruly inmate had kicked the door just prior to its falling on Long or whether the door had fallen of its own accord as Long passed through.

On September 30, 2005, Long filed a complaint for damages, and on December 20, 2005, an amended complaint, alleging that the Hospital was negligent in failing to maintain its premises, causing her injury when the door fell on her. Prior to trial, the Hospital filed a motion seeking clarification as to Long's legal status at the time of her injury. In a February 4, 2008 ruling, the trial court determined that Long was not a business invitee.

A jury trial was held on February 5-7, 2008. Evidence at trial demonstrated that the door's bottom hinge, which was inside the door, was rusted. Although the hinge itself was not visible, some rust was visible on the door frame, floor, and door, and the bottom of the door had a noticeable crack in it. According to Hospital nurse Sandra Lemon, the door had not seemed secure and had not closed correctly.

At the close of evidence, the Hospital moved for a directed verdict, which the trial court denied. The trial court subsequently instructed the jury regarding the Hospital's duty to Long as a licensee as follows:

> In this case, the Plaintiff, Phyllis Long, was a licensee on the property of the Defendant, the Health and Hospital Corporation of Marion County, Indiana d/b/a Wishard Health Services. Licensees enter the property of another at their own risk of injury from existing conditions on the property. However, an owner of property owes a licensee the duty to refrain from willfully or intentionally injuring the licensee or acting in a manner to increase the

> licensee's risk of injury. In addition, an owner has a duty to warn the licensee of any hidden dangers on the property of which the owner has actual knowledge.

Tr. p. 277. The trial court also instructed the jury, however, that the Hospital was liable if it was negligent in (a) failing to maintain its premises in a safe and reasonable manner, or (2) failing to warn of a defective condition. The Hospital did not object to this instruction.

The jury returned a verdict in favor of Long, awarding her $245,000. Pursuant to the jury's verdict, the trial court entered judgment against the Hospital in the amount of $245,000. This appeal follows.

DISCUSSION AND DECISION

On appeal, the Hospital challenges the sufficiency of the evidence to support the judgment. The Hospital acknowledges that the trial court's jury instructions indicated that its standard of care was not only to warn of known dangers based upon Long's licensee status, but also to maintain its premises in a safe and reasonable manner and to warn of defective conditions. This latter standard, which sounded in negligence, is more akin to the standard of care owed by a landowner to a business invitee, which the Hospital assumes for purposes of this appeal is the applicable standard. Accordingly, we evaluate the Hospital's challenge to the sufficiency of the evidence based upon this business invitee standard.

In reviewing the sufficiency of the evidence in a civil case, we must determine whether there is substantial evidence of probative value supporting the judgment. *Jamrosz v. Res. Benefits, Inc.*, 839 N.E.2d 746, 758 (Ind. Ct. App. 2005), *trans. denied*. We neither reweigh the evidence nor judge the credibility of witnesses, but consider only the evidence

most favorable to the judgment along with all reasonable inferences to be drawn therefrom. *Davidson v. Bailey*, 826 N.E.2d 80, 87 (Ind. Ct. App. 2005) (citing *Indian Trucking v. Harber*, 752 N.E.2d 168, 172 (Ind. Ct. App. 2001) (internal citations omitted)). "'The verdict will be affirmed unless we conclude that it is against the great weight of the evidence.'" *Id.* (quoting *Harber*, 752 N.E.2d at 172 (internal citation omitted)). Of course, "[i]f evidence fails to create a reasonable inference of an ultimate fact but merely leaves the possibility of its existence open for surmise, conjecture or speculation, then there is no evidence of probative value as to that ultimate fact. . . ." *Court View Centre, L.L.C. v. Witt*, 753 N.E.2d 75, 81 (Ind. Ct. App. 2001).

To establish a claim for negligence, a plaintiff must establish that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; and (3) the breach of duty proximately caused the injury. *See Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. Ct. App. 2005), *trans. denied*. The first step in analyzing premises liability matters is to determine the plaintiff's visitor status, which defines the duty owed by the landowner. *Morningstar v. Maynard*, 798 N.E.2d 920, 922 (Ind. Ct. App. 2003). A person enters the land of another either as an invitee, licensee, or trespasser. *Id.*

A landowner owes a trespasser the duty to refrain from willfully or wantonly injuring him after discovering his presence. *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991). An Indiana landowner owes a licensee the duty to refrain from willfully or wantonly injuring him or acting in a manner to increase his peril. *Id.* The landowner also has a duty to warn a licensee of any latent danger on the premises of which the landowner has knowledge. *Id.*

A landowner owes the highest duty to an invitee: a duty to exercise reasonable care for his protection while he is on the landowner's premises. *Id.* The Restatement (Second) of Torts § 343 (1965) defines this duty as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Burrell, 569 N.E.2d at 639-40.

The above standard is sometimes framed in terms of actual and constructive knowledge. An invitor is not the insurer of the invitee's safety, and before liability may be imposed on the invitor, it must have actual or constructive knowledge of the danger. *Carmichael v. Kroger Co.*, 654 N.E.2d 1188, 1191 (Ind. Ct. App. 1995), *trans. denied; see Cergnul v. Heritage Inn of Ind., Inc.*, 785 N.E.2d 328, 333 (Ind. Ct. App. 2003) (concluding based upon Restatement standard that parties had not possessed "actual or constructive knowledge" of alleged defect), *trans. denied*.

The Hospital argues that even under the above Restatement standard for invitees, Long failed to demonstrate that the Hospital knew or reasonably should have known of the defective door. In making this argument, the Hospital argues that the door, which had hidden hinges, had no visible defect; that persons using the door had not reported any problem; and that the door worked properly just prior to Long's accident. The Hospital further claims that there was no testimony indicating that its maintenance practices were unreasonable or that

the alleged problem would have been discovered through reasonable inspection. The Hospital argues in addition that there were no prior incidents regarding the door's condition or any other evidence from which a reasonable inference could be drawn that the Hospital knew or reasonably should have known of the defective door.

In support of its position, the Hospital points to *Howerton v. Red Ribbon, Inc.*, 715 N.E.2d 963 (Ind. Ct. App. 1999), *trans. denied; Wellington Green Homeowners' Assoc. v. Parsons*, 768 N.E.2d 923 (Ind. Ct. App. 2002), *trans. denied*; and *Cergnul*, wherein this court, evaluating premises liability claims, concluded that judgment on the evidence against the plaintiff-invitee was proper where the plaintiffs failed to demonstrate that the defendants knew of the alleged defect or that a reasonable inspection would have revealed it.

In *Howerton*, the plaintiff, an overnight guest in the defendant's hotel, injured himself in the bathtub when, in an effort to pull himself out of the bathtub, he grasped the grab bar, which initially supported his weight but ultimately gave way and caused him to fall. 715 N.E.2d at 965. In affirming the trial court's grant of judgment on the evidence, this court observed that the defect was not open and obvious, there was no means of inspecting the allegedly defective attachment securing the bar to the bathtub, there were no reports of any problems with the bar, and given the bar's initial functioning, there was no evidence demonstrating that proper inspection would have revealed the defect. *Id.* at 968.

In *Wellington Green*, the plaintiff, a mail carrier, injured himself when the multi-box mail receptacle he was attempting to open by "jiggling" it with his key, which was not an unusual practice, detached from the wall, throwing him off balance. 768 N.E.2d at 924-25.

This court, citing *Howerton*, concluded that the plaintiff had similarly failed to demonstrate that the defendant knew or should have known of the defect. *Wellington Green*, 768 N.E.2d at 928-29. In reaching this conclusion, this court observed that, like in *Howerton*, the defendants, who did not possess necessary keys, were hindered in inspecting the attachment securing the receptacle to the wall; there were no reports indicating a need to do so; there was no showing that the defendants had installed the receptacle or knew how it had been attached; and that even if an inspection had been conducted by "jiggling" the receptacle, given the plaintiff's prior "jiggling" efforts, it may not have shown the defect. *Wellington Green*, 768 N.E.2d at 928-29.

In *Cergnul*, the plaintiff was injured when, upon using a stairway at the defendant's hotel as he had done twice earlier that day, the railing, which was attached to the drywall only, detached and caused him to fall. 785 N.E.2d at 330. This court, citing *Wellington Green*, concluded that the plaintiff had similarly failed to demonstrate that the defendant knew or should have known that the railing was defective. *Cergnul*, 785 N.E.2d at 333-34. Again, like in *Howerton* and *Wellington Green*, nothing from the railing's appearance or function suggested that it was defective, and seconds before the plaintiff's accident, the railing felt secure. *Cergnul*, 785 N.E.2d at 333-34. Given the lack of evidence suggesting that the defendant knew about or should have discovered the defect, this court affirmed the trial court's judgment on the evidence in favor of the defendant. *Id.*

Here, unlike in *Howerton*, *Wellington Green*, and *Cergnul*, the evidence most favorable to the verdict and all reasonable inferences that may be drawn therefrom

demonstrate that signs indicative of a defect were visible and that in the exercise of reasonable care, the Hospital would have discovered the defect. The door was visibly cracked and rusty at the bottom. There was visible rust on the floor area around the door as well as on the metal doorframe adjacent to the hinge. In addition, Lemon testified that the door did not close correctly and that it "wasn't real secure." Tr. p. 137. Whether or not Lemon reported this problem, her testimony established that the the door did not function properly, and the jury was entitled to credit her testimony on this point. While the hinge itself may have been hidden, the jury was within its discretion to draw the reasonable inference from the cracked door and the visibly rusty floor area, door and doorframe, together with testimony that the door did not function properly, that a reasonable inspection would have revealed the defective hinge.

The Hospital argues that the door worked "properly" just prior to Long's accident and that the rust problem was not visible. While Long testified that she did not notice a problem with the door just prior to the accident, and Deputy Merrell testified that it was "operational," Tr. p. 162, we are not convinced that this evidence precludes a finding that the door was not working properly, especially in light of Lemon's testimony to that effect. With respect to the Hospital's claim that the problem was not visible, while the defective hinge itself was not visible, Long introduced evidence indicating that signs of the problem were visible, including the cracked door and visible rust on the door, doorframe, and floor. To the extent the Hospital argues that this rust was merely residue resulting from the door's removal and would not have been visible prior thereto, the jury was within its discretion to discredit this

evaluation of the evidence. Indeed, Plaintiff's Exhibits I through J-8 show rust running both the length of the crack in Door C as well as the width of Door C and the doorframe, and corroding the paint in some places. The Hospital's claims on these points are merely invitations to reweigh the evidence, which we decline to do. We conclude that there was sufficient evidence to support the verdict and accordingly affirm the trial court's judgment against the Hospital in the amount of $245,000.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.